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Tenaga Nasional Bhd v ATA Industrial (M) Sdn Bhd

B HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCVC-210–10 OF 2017
CHOO KAH SING J
25 NOVEMBER 2018

C *Public Utilities — Electricity — Charges for electricity supplied — Plaintiff claimed for backdated loss of revenue due to alleged tampering of electricity meters by defendant — Claim based on s 38(3) of the Electricity Supply Act 1990 ('the ESA') — Whether plaintiff failed to establish prima facie evidence of amount owed by defendant due to failure to certify as true and correct statement of amount due* D *from defendant — Whether such certification mandated by s 38(4) of the ESA — Whether plaintiff failed to prove meters that were inspected to form the basis of its claim were the ones it had actually installed — Whether installation of cables to bypass electricity meters at defendant's premises could not have been done by defendant alone without help from plaintiff's employees/agents — Whether that* E *finding did not mean plaintiff's claim precluded by doctrine of ex turpi causa non oritur actio as parties did not enter into electricity supply agreement with object of breaching any law or carrying out any illegal act — Whether plaintiff's claim was time-barred — Whether method plaintiff used to calculate its loss grossly unjust and arbitrary*

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The plaintiff's claim against the defendant, based on s 38(3) of the Electricity Supply Act 1990 ('the ESA'), was for an estimated loss of revenue of RM5,089,623.63 for electricity supplied to the defendant between the period 1 March 2009 and 20 February 2014. The plaintiff alleged that the revenue loss G was caused by alleged tampering of electricity meters at two business premises of the defendant. The plaintiff claimed the tampering was discovered when its representatives inspected the two premises on 20 February 2014 and found that cables had been installed that ran from the transformer rooms to the main switch boards without passing through the electricity meters. According to the H plaintiff, the premises inspected were 'property No 7' and 'property No 18' in the Tampoi Industrial Area in Johor. In disputing the claim, the defendant said: (a) the electricity supply accounts cited by the plaintiff for the two premises did not belong to the defendant; (b) apart from 'property No 7' the defendant only occupied the premises at No 9 and not 'property No 18'; (c) the defendant I and/or its agents did not tamper with the electricity meters or install the cables that by-passed the meters as: (i) only the plaintiff's employees had the keys to the locked transformer rooms; and (ii) any such installation would require electricity supply to be switched off and that could only be done from the plaintiff's substation located some distance away from the defendant's

premises; (d) when the plaintiff's employees inspected the defendant's premises in 2011 they did not find any tampering of the electricity meters; hence the plaintiff's computation of loss from 1 March 2009 was incorrect; (e) the defendant's premises were used as warehouses prior to 2013 and only in that year did manufacturing activities start; hence the amount claimed by the plaintiff was wrong and arbitrary; (f) because of the plaintiff's failure to certify as true and correct, as required by s 38(4) of the ESA, the written statement given to the defendant of the alleged loss suffered by the plaintiff, no prima facie evidence of the debt arose for the defendant to rebut; and (g) the plaintiff's claim was time-barred under the Limitation Act 1953.

Held, dismissing the claim:

(1) The two written statements of the plaintiff's estimated loss of revenue signed by the plaintiff's witness, PW13, did not bear PW13's certification that the contents of the statements were true and correct. Such certification was vital under s 38(4) of the ESA in order for the statements to become prima facie evidence of the debt owing. Only if a proper statement was issued and served did the burden shift to the defendant/customer to rebut the presumption of the debt. Before the written statement was issued, the contents, especially the method adopted for the calculation of the amount due, had to be certified as true and correct. The plaintiff had a statutory duty to discharge that burden; otherwise the presumption of prima facie evidence would be abused. By failing to certify the statements, it was possible that PW13 had signed without checking the contents. One of the written statements was issued to the wrong address (ie, property No 18). This rendered the statement questionable. An uncertainty arose as to which meter was inspected — was it the one at property No 18 or at No 9? During cross-examination, PW13 said that he had no personal knowledge of the calculation and the method of calculation used in the said statements. Based on his evidence and the two defective written statements, the plaintiff's claim failed in limine for non-compliance with s 38(4) of the ESA (see paras 44–48).

(2) The claim for loss of revenue in respect of property No 18 was tainted with uncertainty. While the address for the place of inspection was property No 18, it actually took place at premises No 9. The plaintiff did not explain why the meter, which was supposed to be installed at property No 18, ended up being at premises No 9. And while electricity was supplied to premises No 9, the billing address for the invoices was property No 18. There was no conclusive evidence to show that the particular meter in question was in fact fixed at premises No 9. The customer account number stated in the invoices to the defendant also differed from that stated in the contract documents between the parties and the plaintiff did not explain the discrepancy (see paras 15–26).

(3) The court was of the view that the tampering of the electricity meters in this case could not have been done by the defendant or its agents alone without assistance from the plaintiff's employees and/or its agents. The extra cables that ran underground between the transformer rooms and the external main switchboard could not have been installed just before 20 February 2014 and appeared to have been installed when the premises was constructed. Why was no complaint taken when the plaintiff's employees came to carry out commissioning tests on the transformers? If the cables were installed after the transformers were commissioned, the electricity supply had to be shut off first, which could only be done at the TNB substation located some distance away from the premises. The substation was under the plaintiff's control and the keys to the transformer rooms were also kept by the plaintiff's employees at all times. The defendant's representatives could not have committed any tampering without help from the plaintiff's employees/agents (see paras 28–32).

(4) The defendant's contention that the plaintiff's claim was precluded by the doctrine of *ex turpi causa non oritur actio* based on the supposition that its employees had participated in the illegal tampering of the meters could not be sustained because the objective of the parties when they entered into the electricity supply agreement was not to carry out any illegal act or to contravene any law. The doctrine also did not apply for the reason that the plaintiff's claim was based on a statutory right under the ESA (see paras 33, 37 & 39).

(5) The loss of revenue was computed between 1 March 2009 and 20 February 2014 but the plaintiff only filed its action in October 2017. If the breach occurred on 1 March 2009, then limitation would have set in on 2 March 2015. The plaintiff did not explain why it filed its claim only in October 2017 (see para 49).

(6) The court found that the plaintiff's method of calculation of its loss and the manner in which the loss amount was derived was grossly unjust and arbitrary. The evidence established that the premises were only used as warehouses and that there were no machines operating there before 2013. As such, the electricity usage could not be as high as was estimated by the plaintiff. The plaintiff also did not justify why it had adopted the average period between 1 November 2014 and 1 April 2015 as the basis for calculating the average usage of electricity by the defendant. The plaintiff's bar-chart (exh A1) showed that that period recorded the highest usage of electricity. But the period between 1 May 2014 and 1 November 2014 (for proper No 7) and between 1 March 2014 and 1 October 2014 (for property No 18 or premises No 9) recorded the lower average after rectification of the meter. Why did the plaintiff not take the lower average period to calculate the average usage? If that had

been done, or if the plaintiff had used a longer period as the basis for its calculation, the resulting figure would have been vastly lower than what the plaintiff was claiming for in this case (see paras 50–53).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan, berdasarkan s 38(3) Akta Bekalan Elektrik 1990 ('ESA'), adalah untuk anggaran kerugian hasil sebanyak RM5,089,623.63 untuk elektrik yang dibekalkan kepada defendan antara tempoh 1 Mac 2009 dan 20 Februari 2014. Plaintif mendakwa bahawa kerugian hasil tersebut disebabkan oleh dakwaan usikan meter elektrik di dua premis perniagaan defendan. Plaintif mendakwa usikan tersebut ditemui apabila wakilnya memeriksa dua premis tersebut pada 20 Februari 2014 dan mendapati bahawa kabel telah dipasang yang melalui dari bilik pengubah ke papan suis utama tanpa melalui meter elektrik. Menurut plaintif, premis yang diperiksa adalah 'hartanah No 7' dan 'hartanah No 18' di Kawasan Perindustrian Tampoi di Johor. Dalam mempertikaikan tuntutan tersebut, defendan menyatakan: (a) akaun bekalan elektrik yang dinamakan oleh plaintif bagi kedua-dua premis tersebut bukan milik defendan; (b) selain daripada 'hartanah No 7' defendan hanya menduduki premis di No 9 dan bukan 'hartanah No 18'; (c) defendan dan/atau ejennya tidak mengusik meter elektrik atau memasang kabel yang melepasi meter kerana: (i) hanya kakitangan plaintif mempunyai kunci kepada bilik pengubah yang berkunci; dan (ii) apa-apa pemasangan memerlukan bekalan elektrik dimatikan dan itu hanya boleh dilakukan dari pencawang plaintif yang terletak agak jauh dari premis defendan; (d) apabila pekerja plaintif memeriksa premis defendan pada tahun 2011 mereka tidak menemukan sebarang usikan pada meter elektrik; oleh itu, pengiraan kerugian plaintif dari 1 Mac 2009 adalah tidak betul; (e) premis defendan digunakan sebagai gudang sebelum tahun 2013 dan hanya pada tahun itu aktiviti perkilangan bermula; maka jumlah yang dituntut oleh plaintif adalah salah dan rambang; (f) kerana kegagalan plaintif untuk mengesahkan sebagai benar dan betul, seperti yang dikehendaki oleh s 38(4) ESA, pernyataan bertulis yang diberikan kepada defendan atas dakwaan kerugian yang dialami oleh plaintif, tiada bukti prima facie mengenai hutang timbul untuk defendan untuk membantah; dan (g) tuntutan plaintif telah dihalang had masa di bawah Akta Had Masa 1953.

Diputuskan, menolak tuntutan:

(1) Kedua-dua pernyataan tertulis mengenai anggaran hasil kerugian plaintif yang ditandatangani oleh saksi plaintif, PW13, tidak mempunyai perakuan PW13 bahawa kandungan pernyataan tersebut adalah benar dan betul. Perakuan sedemikian penting di bawah s 38(4) ESA agar pernyataan menjadi bukti prima facie mengenai hutang yang terhutang. Hanya jika pernyataan yang betul dikeluarkan dan diserahkan, beban beralih kepada defendan/pelanggan untuk membantah anggapan hutang

tersebut. Sebelum pernyataan bertulis dikeluarkan, kandungannya, terutama kaedah yang digunakan untuk pengiraan amaun yang terhutang, perlu diakui sebagai benar dan betul. Plaintif mempunyai tugas statutori untuk melepaskan beban tersebut; sebaliknya anggapan bukti prima facie akan disalahgunakan. Dengan gagal memperakui pernyataan, ada kemungkinan PW13 telah menandatangani tanpa memeriksa kandungannya. Salah satu pernyataan bertulis telah dikeluarkan ke alamat yang salah (iaitu, hartanah No 18). Ini menyebabkan pernyataan tersebut boleh dipersoalkan. Ketidakpastian timbul mengenai meter yang mana yang diperiksa — adakah ia pada hartanah No 18 atau di No 9? Semasa pemeriksaan balas, PW13 berkata bahawa dia tidak mempunyai pengetahuan peribadi tentang pengiraan dan kaedah pengiraan yang digunakan dalam pernyataan tersebut. Berdasarkan keterangannya dan dua pernyataan bertulis yang cacat, tuntutan plaintif gagal in limine kerana tidak mematuhi s 38(4) ESA (lihat perenggan 44–48).

(2) Tuntutan kerugian hasil berkenaan dengan hartanah No 18 tercemar dengan ketidakpastian. Walaupun alamat untuk tempat pemeriksaan adalah hartanah No 18, ia sebenarnya berlaku di premis No 9. Plaintif tidak menjelaskan mengapa meter, yang sepatutnya dipasang pada hartanah No 18, berakhir di premis No 9. Dan sementara elektrik dibekalkan ke premis No 9, alamat bil untuk invois adalah hartanah No 18. Tiada bukti konklusif untuk memperlihatkan bahawa meter tertentu yang dimaksudkan sebenarnya telah ditetapkan di premis No 9. Nombor akaun pelanggan yang dinyatakan dalam invois kepada defendan juga berbeza daripada yang dinyatakan dalam dokumen kontrak antara pihak-pihak dan plaintif tidak menjelaskan percanggahan tersebut (lihat perenggan 15–26).

(3) Mahkamah berpendapat bahawa usikan meter elektrik dalam hal ini tidak dapat dilakukan oleh defendan atau ejennya tanpa bantuan daripada pekerja plaintif dan/atau ejennya. Kabel tambahan yang lalu di bawah tanah di antara bilik pengubah dan papan suis utama luaran tidak boleh dipasang sebelum 20 Februari 2014 dan kelihatan dipasang apabila premis tersebut dibina. Kenapa tiada aduan yang diambil apabila pekerja plaintif datang untuk menjalankan ujian pentauliahan pada pengubah? Jika kabel dipasang selepas pengubah ditauliahkan, bekalan elektrik terpaksa ditutup terlebih dahulu, yang hanya boleh dilakukan di pencawang TNB yang terletak agak jauh dari premis. Pencawang tersebut berada di bawah kawalan plaintif dan kunci kepada bilik pengubah juga disimpan oleh pekerja plaintif pada setiap masa. Wakil-wakil defendan tidak boleh melakukan apa-apa usikan tanpa bantuan daripada pekerja/ejen plaintif (lihat perenggan 28–32).

(4) Pandangan defendan bahawa tuntutan plaintif telah dihalang oleh

doktrin *ex turpi causa non oritur actio* berdasarkan anggapan bahawa pekerjanya telah mengambil bahagian dalam usikan meter secara haram tidak dapat dikekalkan kerana objektif pihak-pihak apabila mereka memeterai perjanjian pembekalan elektrik adalah bukan untuk melakukan apa-apa perbuatan yang menyalahi undang-undang atau melanggar mana-mana undang-undang. Doktrin ini juga tidak terpakai atas alasan bahawa tuntutan plaintif adalah berdasarkan hak berkanun di bawah ESA (lihat perenggan 33, 37 & 39).

(5) Kerugian hasil dikira antara 1 Mac 2009 dan 20 Februari 2014 tetapi plaintif hanya memfailkan tindakannya pada Oktober 2017. Sekiranya berlaku pelanggaran pada 1 Mac 2009, had masa akan ditetapkan pada 2 Mac 2015. Plaintif tidak menjelaskan mengapa ia memfailkan tuntutannya hanya pada Oktober 2017 (lihat perenggan 49).

(6) Mahkamah mendapati bahawa kaedah pengiraan kehilangan plaintif dan cara memperoleh jumlah kerugian tersebut adalah sangat tidak adil dan rambang. Keterangan membuktikan bahawa premis tersebut hanya digunakan sebagai gudang dan tiada mesin yang beroperasi sebelum 2013. Oleh itu, penggunaan elektrik tidak boleh setinggi yang dianggarkan oleh plaintif. Plaintif juga tidak mewajarkan mengapa ia telah menggunakan tempoh purata antara 1 November 2014 dan 1 April 2015 sebagai asas untuk mengira penggunaan purata elektrik oleh defendan. Carta bar plaintif (eksh A1) menunjukkan bahawa tempoh tersebut mencatat penggunaan elektrik yang tertinggi. Tetapi tempoh antara 1 Mei 2014 dan 1 November 2014 (untuk hartanah No 7) dan antara 1 Mac 2014 dan 1 Oktober 2014 (untuk hartanah No 18 atau premis No 9) mencatatkan purata lebih rendah selepas pembetulan meter. Mengapa plaintif tidak mengambil masa purata yang lebih rendah untuk mengira penggunaan purata? Jika itu yang dilakukan, atau jika plaintif telah menggunakan tempoh yang lebih lama sebagai asas untuk pengiraan, angka yang terhasil akan menjadi jauh lebih rendah daripada apa yang plaintif telah tuntut dalam kes ini (lihat perenggan 50–53).]

Notes

For cases on electricity in general, see 10(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2396–2424.

Cases referred to

Patel v Mirza [2016] UKSC 42, SC (not folld)

Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals [2018] 3 MLJ 141; [2018] 3 CLJ 557, FC (refd)

Legislation referred to

Criminal Justice Act 1993 [UK] s 52
Electricity Supply Act 1990 s 38(3), (4)
Limitation Act 1953

Izatulina Jamaluddin (Amierul Sharafi with her) (Othamn Hashim & Co) for the plaintiff.
GK Sritharan (Sivasangker with him) (GK Sritharan & Co) for the defendant.

Choo Kah Sing J:

INTRODUCTION

[1] The plaintiff's (TNB's) claim is based on s 38(3) of the Electricity Supply Act 1990 ('the Act') for its loss of revenue for the supply of electricity to the defendant due to meter tampering which was allegedly caused by the defendant and/or its agent. The plaintiff's claim is *not* based on breach of contract or tort.

[2] The parties have gone through a full trial. On 30 September 2018, this court dismissed the plaintiff's claim based on its peculiar facts. The reasons for the decision are set down as below.

BACKGROUND FACTS

The plaintiff's case

[3] On 20 February 2014, the plaintiff averred that its representatives went to two premises, namely, Nos 7 ('property No 7') and 18 ('property No 18') both of Jalan Hasil 1, Kawasan Perindustrian Tampoi, 81200 Johor Bahru, Johor.

[4] During the visit to the two premises, the plaintiff's representatives discovered that the electricity meters installed at both the premises had been tampered with. They discovered that there were extra cables which connect directly from the transformer rooms to the main switch boards without passing through the electricity meters. In other words, the actual consumption of the electricity would not be accurately recorded by the meters at both premises.

[5] As a result, the plaintiff, based on its estimated calculation, had suffered a total loss of an estimated value of RM5,089,623.63 ('the loss amount') for the two premises for the period between 1 March 2009 and 20 February 2014.

[6] The estimated loss amount for both premises is tabulated as below:

Property No 7	A/c: 0340 0052 5554 01	RM2,423,666.58
Property No 18	A/c: 0340 0029 7345 01	RM2,665,957.05
Total:		RM5,089,623.63

The defendant's case

[7] The defendant contended that the two TNB's accounts for the two premises do not belong to the defendant. They belong to a company known as Jabco Filter System Sdn Bhd ('Jabco Filter'), and that the two premises bear a postal address as Nos 7 and 9, Jalan Hasil 1, Kawasan Perindustrian Jalan Hasil, Tampoi, 81200 Johor Bahru, Johor, not Nos 7 and 18 as claimed by the plaintiff.

[8] The defendant also contended that its representative(s) and/or agent(s) did not tamper with the TNB's meters and/or had any knowledge of the tampering of the meters, including the installation of the extra cables at the transformer rooms which bypassed the meters and connected directly to the main switchboards. The defendant averred that it was impossible that the defendant's representative(s) and/or agent(s) could have caused the tampering of the meters or could have constructed the cables at the transformer rooms without the plaintiff's employee's knowledge. The defendant alluded two reasons, firstly, only the plaintiff's employee(s) has the keys to the locked transformer rooms. Secondly, the defendant did not have the means to carry out the installation of the extra cables without first switching off the supply of electricity to the two premises. The switching off of the supply of electricity to the two premises could only be done from a TNB substation which is located outside the two premises. The TNB substation was at all material times under the care and control of the plaintiff's employees.

[9] The defendant further contended that it could not be liable because the plaintiff's employee(s) came to inspect the two premises sometime around 2011 as there were several complaints made to TNB that the supply of electricity to the two premises was frequently interrupted, and the plaintiff's employee(s) did not find any tampering at that time. This means the back charged period calculated from 1 March 2009 could not be correct. If the tampering was committed as early as in 2009, the plaintiff's employee(s) would have discovered it on 2011 when the plaintiff's employee(s) carried out the inspection at that material time.

[10] The defendant averred that the plaintiff filed the suit on 3 October 2017, as such the plaintiff's claim would be time barred under the Limitation Act 1953 if the breach was alleged to have had occurred on 1 March 2009.

[11] In the event the plaintiff was able to prove that the defendant was liable for the tampering of the meters, the defendant then challenged the estimated loss amount. The defendant contended that the calculation by the plaintiff was wrong and arbitrary, particularly it did not take into account the period during which there were no manufacturing activities at the two premises until 2013, they were used merely as a warehouse. The consumption of electricity could not be that high as claimed by the plaintiff in its estimated loss of revenue.

THE FINDINGS OF THIS COURT

The two accounts

[12] The defendant contended that the two accounts, namely, A/c: 0340 0052 5554 01 (property No 7) and A/c: 0340 0029 7345 01 (property No 18) do not belong to the defendant.

[13] During the trial, the plaintiff adduced two documents to prove the accounts belonged to the defendant, and the documents were marked as exhs 'J1' and 'J2'.

Account for property No 7

[14] Exhibit J1 is a contract document entered into between the plaintiff and the defendant, and it was dated 3 April 1998. The premises where the plaintiff was supposed to supply the electricity to was property No 7. The account number of the customer (which is the defendant) was '525554'. Based on the plaintiff's monthly invoices (see examples pp 45–50 of exh 1A) addressed to the defendant, the account number of the customer is stated as '0340 00525554 01'. The underscore reflects the same customer account number as in exh J1. Hence, the current monthly invoices do reflect the contract entered into between the plaintiff and defendant. Clearly, the account No '0340 00525554 01' belonged to the defendant for the property No 7 despite the fact the premises was occupied by Jacob Filters.

Account for property No 18

[15] Exhibit J2 is also a contract document entered into between the plaintiff and defendant, and it was dated 8 March 1996. The place where the plaintiff was supposed to supply the electricity was stated as No 9, Jalan Hasil 1, Kawasan Perindustrian Tebrau. The customer account number was stated as '6002029203 and the contract number was stated as '9607907'.

[16] Upon close examination of the plaintiff's monthly invoices (see examples pp 99–104) to the defendant, the invoices stated clearly the contract

number is '09607907' which matches the one stated in exh J2. Based on the invoices, electricity was supplied to the premises at No 9. However, the glaring discrepancy is that the billing address of the invoices was addressed to property No 18, instead of premises No 9.

[17] During the inspection which took place on 20 February 2014, the plaintiff's employees actually went to premises bearing a postal address No 9, instead of No 18 of Jalan Hasil 1, Kawasan Perindustrian Tampoi, 81200 Johor Bahru, Johor. The plaintiff did not provide explanation to the court as to why the plaintiff's employees ended up at No 9 premises despite the fact that the billing address and the place of inspection was supposed to be premises No 18 (or property No 18).

[18] The plaintiff's counsel submitted that the premises' number had changed due to changes in the TNB's system. This submission did not make sense. The plaintiff is a utility company, it could not simply change the customer's address, unless the plaintiff had made a mistake in its records, but that was not alluded by the plaintiff.

[19] This court observes that the plaintiff's employees stated the address for the place of inspection was property No 18, but it actually took place at premises No 9. This is evidenced from the photographs tendered by the plaintiff (see pp 57–58 exh 1A). The 'Maklumat Jangka' slip in the photograph stated that the address as '18, Jln Hasil 1 ...', but the inspection actually took place at premises No 9. This is inconsistent evidence from the plaintiff. No evidence was adduced to explain the discrepancy.

[20] With regard to the submission that the meter serial No '28502423' was supposed to be installed at property No 18, and that meter was found at premises No 9, as such, property No 18 is premises No 9, the submission is untenable. There is no evidence to suggest that the plaintiff's employees had actually gone to premises No 9 to install the meter bearing the serial No '28502423' when it was supposed to be installed at property No 18.

[21] The fact that the meter bearing the serial No '28502423' was found at premises 9 could not prove that premises 9 was meant to be the same premises as property 18. The recording of the serial number of the meter on the 'Maklumat Jangka' slip could not provide any valuable information, because the information of the serial number of the meter could be filled on the 'Maklumat Jangka' slip on the spot upon checking the meter which was already fixed at the premises No 9. There is no conclusive evidence adduced by the plaintiff to show that the particular meter bearing the serial No '0340 00525554 01' was in fact fixed at premises No 9.

A **[22]** The plaintiff's evidence referring to the particular meter installed at premises No 9 which it claimed to be the same as property No 18 which belonged to the defendant's account is questionable.

B **[23]** Further, the plaintiff's monthly invoices which were addressed to property No 18 did not state what the serial number of the meter is. The contents of the invoices merely state the contract number which is the same as stated in exh J2.

C **[24]** This court is baffled with another piece of plaintiff's evidence. As mentioned earlier, the contract number in exh J2 and the monthly invoices is the same. However, it is observed that the customer account No 6002029205 stated in exh J2 is different from the monthly invoices. The customer account number in the monthly invoices was stated as 0340 00297345 01. Why was there a difference? The plaintiff did not provide satisfactory explanation as to why there was a difference between exh J2 and the monthly invoices in relation to the customer account number.

D

E **[25]** Based on the above, this court finds the claim for the loss of revenue against the defendant for the customer account at property 18 is tainted with uncertainty.

F **[26]** Notwithstanding what was found by this court, this court is equally baffled as to why the defendant did not protest the monthly invoices it had received all those years or attempt to seek clarification from the plaintiff, and why the defendant had paid the monthly invoices although they were addressed to property 18.

Tampering

G

[27] On the issue of tampering, based on the evidence adduced by the plaintiff in court, especially the evidence of PW3 and PW7, the evidence clearly revealed and explained as to how the record of the consumption of electricity in both the premises had been compromised. The photographs (see H pp 13–24 and 64–77 exh '1A') tendered by the plaintiff evidently show extra cables were installed at the transformers in the transformer rooms and connected to a foreign switchboard bypassing the meters. This court does not intend to regurgitate the plaintiff's evidence here. The documentary evidence vividly shows tampering was committed at both the premises.

I

[28] Notwithstanding the finding of tampering at both premises, this court is of the view the tampering could not have committed by the defendant's representative(s) and/or its agents alone without any assistance being offered by the plaintiff's employee(s) and/or its agent(s).

[29] First, the extra cables which were fixed or connected to the transformers in the transformer rooms were conspicuously large in size. One could not miss or overlook that extra cables were connected to the transformers. Anyone from TNB with electrical or technical knowledge who has been trained by TNB would have noticed the extra cables when they visited or inspected the transformer rooms in the past. The plaintiff's evidence was the extra cables were only noticed on 20 February 2014. The extra cables could not have been installed just before 20 February 2014 because those cables were carefully and neatly positioned and ran through the ground in the transformer room from one end and came out to another end connecting to the external main switchboard. This means the extra cables appear to have been installed and constructed during the time of construction of the premises. When the plaintiff's employees came to the premises to carry out commissioning test on the transformer at the premises, the plaintiff's employees ought to have noticed the extra cables then. Why was there no complaint about the extra cables that were illegally connected to the transformers then?

[30] Secondly, in the event the extra cables were installed after commissioning of the transformer, this court accepts the defendant's submission that in order to connect the extra cables to the transformers, the supply of the electricity has to be shut down completely by TNB. Electricity supply to the transformer room could only be shut down completely through a TNB substation outside the premises, and that TNB substation is located some distance away from the premises. The TNB substation was and still is in full control of the plaintiff's employees and/or agent(s). Someone from TNB must have acted in concert with the defendant to shut down the power supply to the premises from the TNB substation to allow the extra cables to be connected to the transformers in the premises. This must have had happened at some point in time after the commissioning of the transformer.

[31] Thirdly, the keys to the transformer rooms were kept at all times by the plaintiff's employees. Even if the defendant's representative(s) could unlock the transformer rooms, the defendant's representative could not connect the extra cables to the transformer if the electricity supply is not shut down. Only the plaintiff's employees could shut down the electricity supply as alluded above. Those extra cables were meant for high voltage, and only highly qualified electrician and/or electrical engineers could perform the task of connecting the cables to the transformer. Both the transformer rooms and the TNB substation were at all material times under the control of the plaintiff's employees. As such, the defendant's representative(s) could not have committed such an elaborate illegal act without the plaintiff's employee(s) help.

[32] Hence, the irresistible inference from the circumstances would be the plaintiff's employee(s) must have acted in cahoots with the defendant in committing the tampering/illegal act.

[33] The defendant's counsel submitted that the doctrine of *ex turpi causa non oritur actio* (from a dishonourable cause an action does not arise) should avail to its defence, since the plaintiff's employee(s) was part of the illegal act, the plaintiff ought to be vicariously liable for the actions committed by its own employee(s) and/or representative(s) and/or agent(s). Hence, the plaintiff could not enforce its claim which based on an illegal act which the plaintiff had participated in it through its own employee(s). The plaintiff's claim ought to be precluded by the doctrine of *ex turpi causa non oritur actio*.

[34] The application of the doctrine of *ex turpi causa* was recently examined in the Supreme Court of England in *Patel v Mirza* [2016] UKSC 42. In this case, Mr Patel paid a sum of £620,000 to Mr Mirza to place a bet on a particular company's shares on the basis of an insider information. In England, it is an offence to use advance insider information to profit from trading in securities, as it contravenes s 52 of the Criminal Justice Act 1993. Hence, Mr Patel and Mr Mirza had entered into an illegal agreement to use the money for the purpose of 'insider dealing'. The insider information was not forthcoming and it was a mistake, and Mr Mirza did not place the bet. Mr Patel then requested his money back, but Mr Mirza refused to return the money. Mr Patel then sued Mr Mirza for the return of his money. Mr Mirza pleaded *ex turpi causa* as his defence claiming that the agreement they entered into was an illegal agreement, therefore, Mr Patel's claim ought be precluded by the principle of *ex turpi causa non oritur actio*.

[35] On the application of the doctrine *ex turpi causa*, Lord Toulson has this to say:

> [101] ... I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law.

[36] The Supreme Court of England rejected Mr Mirza's defence and relied on the principle of unjust enrichment to allow Mr Patel's claim. His Lordship Toulson has this to say:

> [121] A claimant, such as Mr Patel, who satisfied the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as *undermining the integrity of the justice system*, but there are no such circumstances in this case. I would dismiss the appeal.

[37] In our present case, this court is of the considered view that the doctrine could not apply. The object of the plaintiff and defendant in entering into the agreement was, at the first place, not intended to carry out any illegal act neither would the performance of the contract contravene any law in the country.

[38] Although in the midst of performing the contract, an illegal act was committed by the plaintiff's employee(s), the doctrine *ex turpi causa* or the defence of illegality would not automatically avail to the defendant's defence. This is because the commission of the illegal act by the defendant in cahoots with the plaintiff's employee(s) was in fact a breach of the contract on the defendant's part. The plaintiff had under no circumstances condoned its employee's participation in the illegal act. It was the plaintiff's employee(s) who on his own volition and own frolic acted in cahoots with the defendant. It would be unjust to put the responsibility for every action of its employees acting outside of his/her scope of works on the plaintiff.

[39] The plaintiff's claim is based on a statutory right established under the Act. Hence, there is no issue whether the enforcement of the plaintiff's claim might be regarded as undermining the integrity of the justice system or otherwise. The doctrine *ex turpi causa* could not lend a hand to the defendant in this instance.

[40] Notwithstanding what is said above, this court is still not satisfied that the plaintiff's case has been proved on a balance of probabilities. This court is troubled by the serious discrepancy in the plaintiff's evidence relating to the inspection carried out on 20 February 2014 at premises No 9 when supposed to be at property No 18, and the plaintiff's failure to explain how the tampering could be carried out by the defendant alone without the plaintiff's employee(s) and/or agent(s) having participated in it.

The plaintiff's claim is based only on s 38(3) of the Act

[41] The defendant's counsel submitted that the plaintiff failed to plead unjust enrichment in its statement of claim and the plaintiff based its claim solely on s 38(3) of the Act. This court agrees with the defendant's counsel's

submission. Hence, the plaintiff could not rely on the principle of unjust enrichment.

[42] The defendant's counsel further submitted that since the plaintiff's claim is based solely on s 38(3) of the Act, therefore, its claim must satisfy the requirements as stated under the Act.

[43] The defendant's counsel averred that the plaintiff must first prove that there was a written statement stating the amount of loss of revenue and that statement is a prima facie evidence of its losses. In order to rely on the prima facie evidence, the statement must be issued in compliance with s 38(4) of the Act. The defendant's counsel relied on the Federal Court decision of *Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals* [2018] 3 MLJ 141; [2018] 3 CLJ 557, wherein the apex court has laid down the requirements as follows:

> [62] For a written statement to have the effect of a prima facie evidence, it must be issued in compliance with the requirement of s 38(4) of the Act. In *Tenaga Nasional Berhad v Dunia Raya Enterprise Sdn Bhd* the Court of Appeal, at P 757, held that for TNB to rely on a written statement, tbe following must have taken place:
>
> (i) The appellant must have calculated the loss of revenue and reduce it into a document and written statement;
>
> (ii) an employee and/or duly authorised person of the appellant must have perused the document as well as the written statement to *certify* the written statement;
>
> (iii) the certified written statement must contain the particulars stated in s 38(4) of ESA 1990;
>
> (iv) for a valid certificate, the name of the employee or authorised person of the appellant must appear in the statement and duly signed;
>
> (v) if a proper certified statement is issued, it needs to be served on the customer and if the customer does not pay, then civil action can be taken. Thus, it is a condition precedent for initiation of civil action in reliance of s 38 for Tenaga to issue a certified written statement according to law, before civil action can be commenced;
>
> (vi) ...

[44] The defendant's counsel complained that the plaintiff failed to comply with s 38(4) of the Act, particularly in reference to the word 'certified'. The two written statements issued by the plaintiff's witness Mohd Latif bin MD Kadir (PW13) both dated 26 July 2016 (for properties 7 and 18 respectively) (see pp 40–42 and 94–96 exh '1A') did not expressly state that he certified the contents of the letters as true and correct.

[45] The law requires that the employee or authorised person of the plaintiff to certify the contents of the written statement. This requirement is to ensure that the contents, particularly the amount of the loss of revenue calculated based on the method adopted by the plaintiff, are true and correct. This is vital because the written statement is a prima facie evidence of a debt owing. Once a proper statement has been issued and properly served, then the burden would shift to the defendant/customer to rebut the presumption. Hence, before the written statement is issued, the contents, especially the method adopted for the calculation has to be certified as true and correct. The plaintiff has a statutory duty to discharge that burden, otherwise, the presumption of prima facie evidence would be abused.

[46] In the present case, the plaintiff's witness PW13 did not state clearly that the contents has been certified as true and correct, he merely signed off the notices without declaring that the contents had been certified as true and correct. By failing to certify, it is possible he signed without checking the contents, especially the method of calculation and the amount claimed as true and correct. One of the written statement was issued to the wrong address, this itself would render the statement as questionable (see p 94 exh '1A'). An uncertainty arises with regard to the inspection of the meter which was installed at the property in question — was it the meter installed at property 18 or 9?

[47] The defendant's counsel also complained that PW13 who issued the written statements had, in cross-examination, stated that he did not have any personal knowledge of the calculation and the method of calculation adopted in the written statements. This clearly shows that he did not 'certify' the contents as true and correct as it is required by the law.

[48] Based on the evidence of PW13 and the two defective written statements, the plaintiff's claim ought to fail in limine for non-compliance with s 38(4) of the Act.

Limitation

[49] On the issue of limitation, the plaintiff claimed the loss of revenue the period from 1 March 2009–20 February 2014. However, the action was taken out only on October 2017. If the plaintiff took 1 March 2009 as the starting point of time the breach occurred, then the limitation would set in on 2 March 2015. The plaintiff did not explain as to why its claim was filed only in October 2017.

Claim for loss of revenue — unjust and arbitrary

[50] The plaintiff also did not explain as to why it took the period between 1 March 2009–20 February 2014 as the back charges period for its estimated loss of revenue. The period taken by the plaintiff for back charges as its loss of revenue was rather arbitrary.

[51] The defendant also complained that the plaintiff's witness Amarishwari Balakrishnan Naidu (PW10) took the period for the calculation of the loss of revenue did not take into consideration that both the premises were used as a warehouse and that there were no machines operating on the premises prior to 2013. As such, the usage of electricity could not be that high as estimated. PW10 told the court that she was not aware of the fact the premises were used as warehouse prior to 2013. She merely obtained the information from the technical team and input the data into the system using the averaging method to calculate the estimated loss amount. The defendant's witness Nazri bin Mohd Nasir (DW6) from Jabatan Keselamatan dan Kesihatan Pekerja, Johor, testified that he came to inspect the premises on 22 January 2013 to register the machines that were installed at the premises. Prior to the date, there was no machine registered, said DW6. DW6's evidence was not discredited. DW6's evidence supported the averment of the defendant that there were not any machines operating at the premises before 2013. This court accepts DW6's evidence as credible, therefore, the period taken by the plaintiff to back charge its loss of revenue starting from 1 March 2009 would be unjust and arbitrary.

[52] The plaintiff took the average period between 1 November 2014 and 1 April 2015 as the basis of calculation for the average usage of the electricity. The question arises as to why the plaintiff took the highest average months as the basis of calculation for the average usage of the electricity? The bar-chart adduced by the plaintiff at p 39 of exh A1 (for property 7) depicts the period between 1 May 2014 and 1 November 2014 was at the lower average after the meter was rectified on 20 February 2014. Why didn't the plaintiff take the lower average period for its calculation for the average usage, instead of taking the higher average period? As the plaintiff took the higher average period as its basis of calculation for the average without justification, its action is indeed unjust and arbitrary.

[53] The same approach was applied by the plaintiff to property No 18 (or premises No 9) (see p 93 of exh 'A1'). The higher average period was between 1 November 2014 and 1 April 2015 which was used by the plaintiff for the average usage amount; the plaintiff did not take into account the lower average period between 1 March 2014 and 1 November 2014. If the plaintiff had used the lower average period as its basis of calculation for the average usage, the resulting figure would be vastly different from the figure the plaintiff has

asserted was its loss. If the plaintiff had taken a longer period as its basis for calculation for the average usage, the result would also be very different. For example, if the plaintiff had taken the usage from 1 March 2014–1 April 2015, the result could be half of the amount that the plaintiff is claiming in this action. Hence, this court finds that the plaintiff's method of calculation and the manner in which it derived the amount as the estimated loss amount was grossly unjust and arbitrary.

[54] Based on the above submissions of the defendant, and based on the findings of this court, this court is satisfied that the defendant has successfully defended the plaintiff's claim.

[55] The court has also considered the other complaints raised by the defendant's counsel in his submissions which are not stated in this judgment. The court did not deal with these complaints in this judgment because the court is of the opinion that the earlier complaints are sufficient for this court to dismiss the plaintiff's claim, especially the complaint that the plaintiff failed to comply with the statutory requirements under s 38(4) of the Act — that PW13, the authorised person, had failed to certify and had no personal knowledge of the contents in the written statements as true and correct. On this point alone, the plaintiff's case which based on s 38(3) of the Act must fail.

CONCLUSION

[56] Based on the above finding, this court dismissed the plaintiff's claim and ordered the plaintiff to pay costs of RM30,000 to the defendant.

Claim dismissed.

Reported by Ashok Kumar